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No. 93-1797

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

INSURANCE COMPANY OF NORTH AMERICA, *et al.*,

Petitioners,

vs.

MORTON INTERNATIONAL, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

APPENDIX TO BRIEF OF RESPONDENTS IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 93-5777, 93-5794

CHEMICAL LEAMAN TANK LINES, INC.,

Plaintiff-Appellee,

v.

THE AETNA CASUALTY & SURETY COMPANY,

Defendant-Appellant,

ROBIN ANTHONY GILDART JACKSON,
AN UNDERWRITER AT LLOYD'S, LONDON, *ET AL.*,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

BRIEF OF APPELLEE CHEMICAL LEAMAN TANK LINES, INC.

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May 17, 1994

DISCLOSURE OF CORPORATE AFFILIATION AND FINANCIAL INTEREST

Pursuant to Federal Rule of Appellate Procedure 26.1, Chemical Leaman Tank Lines, Inc. makes the following disclosure:

1. Said party is not a subsidiary or affiliate of a publicly owned corporation.

2. There is no publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome of this case.

May 17, 1994

/s/Kevin B. Clark

Kevin B. Clark

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In *Morton*, the New Jersey Supreme Court also held that the standard pollution exclusion only precludes coverage when the insured "intentionally discharges a known pollutant." *Id.* at 78, 629 A.2d at 875. In reaching this conclusion, the Supreme Court found that the term "sudden" included a temporal element, but refused to apply the literal meaning of the pollution exclusion because: (1) the insurance industry had grossly misrepresented its meaning and significance to state insurance regulators, and therefore was barred from asserting a more restrictive meaning under the doctrine of regulatory estoppel; and (2) the insurance industry had unfairly profited from those misrepresentations by failing to reduce premiums to a lower level that would "undoubtedly" have been required if full disclosure had been made. *See* 134 N.J. at 75-78, 629 A.2d at 874-75 (applying regulatory estoppel); *id.* at 72-73, 629 A.2d at 872 ("the conclusion is inescapable that a significant rate reduction would have been required," if full disclosure had been made). Thus, while the reasoning of the trial court and the *Morton* Court diverged somewhat, they reached the same conclusions regarding the core meaning and application of the pollution exclusion.

A. Aetna And LMI Are Bound By *Morton's* Interpretation Of The Pollution Exclusion.

The *Morton* decision unambiguously held that the standard pollution exclusion that was presented to the New Jersey Department of Insurance by the Insurance Rating Board ("IRB") must be restrictively construed to exclude coverage only for "intentional discharges of known pollutants." The Court determined that, in light of its ruling on other issues, it did not need to decide whether its estoppel holding would similarly restrict the interpretation of "non-standard" pollution exclusions. *Id.* at 28, 629 A.2d at 847.

It is undisputed that Aetna's policies contained the standard IRB pollution exclusion and are thus subject to the Supreme Court's ruling. LMI, however, urge that they are exempt from

this holding and, thus, should benefit from *Morton*'s temporal reading of "sudden" because, they claim, most of their policies contained non-standard pollution exclusions, and because they assert that they were not a party to misrepresentations made to the New Jersey's insurance regulators. These arguments should be rejected.

1. LMI's Pollution Exclusions Are Legally Indistinguishable From The Standard IRB Exclusion.

First, as LMI concede, their policies in effect from April 1, 1974 through April 1, 1977 contained the "standard" IRB "sudden and accidental" pollution exclusion language that was at issue in *Morton*. LMI Br. at 24. The *Morton* court held that every policy containing that clause is bound by its regulatory estoppel holding, without regard to the identity of the insurer. 134 N.J. at 78, 629 A.2d at 875. As such, it is indisputable that the 1974-77 LMI policies are bound by the *Morton* decision.

The LMI policies from 1971-74 and 1977-81 contained a standard form pollution exclusion (designated "NMA 1685") that the trial court found – and LMI has conceded – is legally synonymous with the "sudden and accidental" language in the standard IRB pollution exclusion. JA8670, 8702, 8708 (SJ opin.); *Potomac Elec. Power Co. v. California Union Ins. Co.*, 777 F. Supp. 968, 978 n.23 (D.D.C. 1991) (LMI, represented by Mendes & Mount, admitted that there is no material difference between "sudden and accidental" in the IRB exclusion and "sudden, unintended and unexpected happening" in the NMA 1685 exclusion); *accord Olin Corp. v. Insurance Co. of N. Am.*, 762 F. Supp. 548, 563 (S.D.N.Y. 1991), (court found "no meaningful difference" between wording of IRB standard pollution exclusion and those containing the "sudden, unintended and unexpected" language), *aff'd*, 966 F.2d 718 (2d Cir. 1992). Thus, all of LMI's pollution exclusions in this case – unlike those involved in

APPENDIX B

RESPONDENTS' RULE 29.1 STATEMENTS

1. ***Dominion Insurance Company Limited***
Parent Companies:

The immediate holding company of Dominion Insurance Company Limited is Dominion Insurance Holdings Limited and its ultimate holding company is Fondiaria, SpA.

Subsidiaries (except for wholly-owned):

None.

2. ***British Merchants Insurance Company Limited***
Parent Companies:

British Merchants Insurance Company merged into Dominion Insurance Company Limited. Its immediate holding company is Dominion Insurance Holdings Limited and its ultimate holding company is Fondiaria, SpA.

Subsidiaries (except for wholly-owned):

None.

3. ***London & Edinburgh Insurance Company Limited***
Parent Companies:

London & Edinburgh Insurance Company Limited is a wholly-owned subsidiary of London & Edinburgh Insurance Group Limited which is, in turn, owned by Hartford International Insurance Company which is, in turn, owned by ITT Corporation.

Subsidiaries (except for wholly-owned):

London & Edinburgh Insurance Company Limited has one subsidiary that is not wholly-owned: Excess Underwriting Management Singapore Limited, which is in liquidation.

4. ***World Marine & General Insurance Company Limited***
Parent Companies:

World Marine & General Insurance Company Limited is wholly-owned by the Broken Hill Proprietary Company Limited.

Subsidiaries (except for wholly-owned):

None.

5. ***Royal Scottish Insurance Company Limited***
Parent Company:

Royal Scottish Insurance Company Limited, now known as Royal Scottish Assurance Company, is wholly-owned by the Royal Bank of Scotland Group plc.

Subsidiaries (except for wholly-owned):

Royal Scottish Assurance Company has one subsidiary that is not wholly-owned: Royal Scottish Assurance Services Limited.

6. ***Trent Insurance Company Limited***
Parent Companies:

Trent Insurance Company Limited was merged into Eagle Star Insurance Company Limited. Its holding company is Eagle Star Holdings plc and its immediate holding company is B.A.T. Financial Services Limited. The ultimate holding company is B.A.T. Industries plc.

Subsidiaries (except for wholly-owned):

None.

7. ***River Thames Insurance Company Limited***
Parent Companies:

The immediate holding company of River Thames Insurance Company Limited is Transamerica Insurance Company which owns 51% of the company. The ultimate holding company is Transamerica Corporation. The remaining 49% is owned by Sedgwick Group plc.

Subsidiaries (except for wholly-owned):

None.

8. ***English & American Insurance Company Limited***
Parent Companies:

English & American Insurance Company Limited is in provisional liquidation. All litigation regarding this company has been stayed pursuant to order of the United States Bankruptcy Court for the Southern District of New York. The ultimate holding company is English & American Group plc. No appearance is entered for this company and it should be deemed a party not interested in the petition.

Subsidiaries (except for wholly-owned):

English & American has the following four subsidiaries which are not wholly-owned:
(1) Eastgate Investments Limited
(2) Oberon Underwriters Limited
(3) Tower House Investments Limited
(4) Transglobe Underwriting Management

9. ***World Auxiliary Insurance Corporation Limited***
Parent Companies:

World Auxiliary Insurance Corporation Limited is a wholly-owned subsidiary of Commercial Union Assurance Company plc which is, in turn, a wholly-owned subsidiary of Commercial Union plc.

Subsidiaries (except for wholly-owned):

None.

10. ***Andrew Weir Insurance Company Limited***
Parent Companies:

Andrew Weir Insurance Company Limited is in provisional liquidation. All litigation regarding this company has been stayed pursuant to order of the United States Bankruptcy Court for the Southern District of New York. No appearance is entered for this company and it should be deemed a party not interested in the petition.

Subsidiaries (except for wholly-owned):

None.

11. ***Orion Insurance Company Limited***
Parent Companies:

Orion Insurance Company Limited is now known as Orion Insurance Company plc. It is a wholly-owned subsidiary of Nationale-Nederlandan NV which is, in turn, a wholly-owned subsidiary of Internationale Nederlanden Verzekeringen NV.

Subsidiaries (except for wholly-owned):

Orion Insurance Company plc has one subsidiary which is not wholly-owned: Orion Marine Insurance Underwriting Agency Limited.

12. ***Drake Insurance Company Limited***
Parent Companies:

Drake Insurance Company Limited was merged into Sphere Drake Insurance plc. Its immediate holding company is Sphere Drake Insurance Group plc which is, in turn, wholly-owned by Sphere Drake Acquisitions Limited which is, in turn, wholly-owned by Sphere Drake Holding plc (U.K.), which is, in turn, wholly-owned by Sphere Drake Limited which is, in turn, wholly-owned by SD Holding Limited which is, in turn, wholly-owned by Sphere Drake Holdings Limited (Bermuda).

Subsidiaries (except for wholly-owned):

None.

13. *Sphere Insurance Company Limited*
Parent Companies:

Sphere Insurance Company Limited is now known as Sphere Drake Insurance plc. Its immediate holding company is Sphere Drake Insurance Group plc which is, in turn, wholly-owned by Sphere Drake Acquisitions Limited which is, in turn, wholly-owned by Sphere Drake Holding plc (U.K.), which is, in turn, wholly-owned by Sphere Drake Limited which is, in turn, wholly-owned by SD Holding Limited which is, in turn, is wholly-owned by Sphere Drake Holdings Limited (Bermuda).

Subsidiaries (except for wholly-owned):

None.

14. *Minster Reinsurance Company Limited*
Parent Companies:

Minster Reinsurance Company Limited is now known as GAN Minster Insurance Company Limited which is a wholly-owned subsidiary of GAN International SA. The ultimate holding company is Société Centrale du Groupe des Assurances Nationales.

Subsidiaries (except for wholly-owned):

GAN Minster Insurance Company has thirteen subsidiaries which are not wholly-owned:

(1) Progress Insurance Company Ltd.
(2) Progress Assurance SA.
(3) Arthur Street Investments Ltd.
(4) Arthur Street Management Ltd.
(5) Hobbs Savill Ltd.
(6) Minster Assets Ltd.
(7) Minster Development Co. Ltd.
(8) Minster Discount & Guarantee Co. Ltd.
(9) Minster Estate & Property Co. Ltd.
(10) Minsure Nominees Ltd.
(11) Robert Bradford & Co. Ltd.
(12) Robert Bradford Ltd.
(13) Touchline Service Ltd.

15. ***British National Life Insurance Society Limited***
Parent Companies:

British National Life Insurance Society Limited is now known as British National Life Assurance Company Limited. Its immediate holding company is CI Services Holdings Limited, and its ultimate holding company is Wingfield Limited.

Subsidiaries (except for wholly-owned):

None.

16. ***Insurance Corporation of Ireland Limited***
Parent Companies:

Insurance Corporation of Ireland Limited, now known as Icarom, is wholly-owned by ministers of, and in trust for, the government of the Republic of Ireland.

Subsidiaries (except for wholly-owned):

None.

17. ***British Northwestern Insurance Company Limited***
Parent Companies:

British Northwestern Insurance Company Limited is wholly-owned by Armco Insurance Group Inc. which is, in turn, wholly-owned by Armco Financial Services Corporation which is, in turn, wholly-owned by Armco, Inc.

Subsidiaries (except for wholly-owned):

None.

18. ***Underwriters at Lloyd's, London***
Parent Companies:

The Underwriters at Lloyd's, London are natural persons.

Subsidiaries (except for wholly-owned):

None.

19. ***Affiliated FM Insurance Company***
Parent Companies:

Affiliated FM Insurance Company is a wholly-owned subsidiary of Allendale Associates, Inc., which is, in turn, a wholly-owned subsidiary of Allendale Mutual Insurance Company.

Subsidiaries (except for wholly-owned):

None.